

Political Vendetta Exacerbated by Investigative Agencies, Fueled by Judicial Paranoia

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Introduction

Time and again, constantly the Honourable Supreme Court has repeatedly, strongly advocated for the basic rule of law in our criminal justice system - "*Bail, not jail*"

There are a plethora of S.C Judgments, which reinforce this basic rule again and again with regular frequency. The Apex Court, vide various judgments, stressed on the following tenets:

1. Courts must ensure that they continue to remain the first line of defence against the deprivation of the liberty of citizens.
2. Deprivation of liberty even for a single day is one too many.
3. Courts must always be mindful of the deeper systemic implications of their decisions.

Despite such amplified and clear advisories from the Apex Court, the Lower Courts and very often High Courts suffer from indifference or paralysis in granting bails, resulting in long period of incarceration of suspects, who are forced to suffer every moment of their judicial custody in prisons which are overcrowded and therefore super spreaders of COVID, devoid of medical facilities, lack of basic hygiene conditions and severe malnutrition, resulting in a huge adverse impact on life expectancy. What is distinctly alarming is that the lower courts are in the tight grip of a severe fear psychosis, while hearing bail matters of Special Acts such as the PMLA (Prevention of Money Laundering Act)¹. The ED has created a paranoia not amongst the accused, but this paranoia has percolated and frozen the Lower Courts to examine objectively, without fear or favour while meritoriously deciding bail matters in PMLA cases, resulting in long period of captivity of the suspects, who are illegally compelled to undergo pre-trial protracted period of punishment in suffocable prison conditions.

Time and again, the Apex Court has consistently stressed that keeping an under trial in Jail seriously jeopardise the preparation of the accused is not able to effectively brief and consult with his lawyers, collate evidence in his defence and hereby defend himself effectively. Clearly, this result in the accused being denied the right to fair trial guaranteed under Article 21² of the Constitution. Also, the burden of the accused detention frequently falls heavily on the innocent members of his family who are often helpless given the lack of knowledge of draconian laws, as well as paucity of financial resources given humongous legal costs as bail periods are highly extended.

Due to the profile of the PMLA cases, the lower courts push the cases off their desk by rejecting the bails, in complete disregard of the Apex Court rule that the Right to Bail³ is not to be declined merely because of the

sentiment of community or for the purpose of giving the undertrial "a taste of imprisonment as a lesson" or to facilitate political pressures from a highly aggressive Central Government.

Now, let us look at how two sections of PMLA still impose on the minds of the lower courts in rejecting bails, despite the fact that one section has been declared ultra-vires by the Apex Court, and the other section is only effective at the time of trial.

Section 45 of the PMLA⁴

Section 45 stipulates twin conditions to be fulfilled for grant of bail which are

Section 45(1): Where the public prosecutor has been given an opportunity to oppose the bail application.

- a. The court is satisfied that there are reasonable grounds for believing that the applicant is not guilty of such offence and
- b. That the applicant is not likely to commit any offence while on bail

The limitation of granting bail as specified in section 45(1) are in addition to limitations under code of civil procedure or any other law for the time being in force on granting bail. However,

the Apex Court in its landmark Judgment of *Nikesh Tarachand Case*⁵ held that the provisions as laid down in Section 45 of the PMLA are unconstitutional as it violates Article 14 and Article 21 of the constitution of India.

Even after the amendment to Section 45 came into effect subsequent to the Hon'ble S.C Judgment in *Nikesh Tarachand shah*, various H.C have concluded that the Hon'ble S.C Judgment holds good and that the provisions of Section 45 are unconstitutional and violative of Article 14 and Article 21 of the Constitution of India. Some of the relevant judgments being of:

- *Rakesh Manekchand Kothari vs. Union of India*⁶
- *Madhya Pradesh H.C in case of Dr. Vinod Bhandari*⁷
- *Delhi H.C in case of Upendra Rai*.⁸

But what is appealing is that the ED (in complete disregard of the Hon'ble SC Judgment of Section 45 being ultra-vires/ violative of Article 14 & 21 of the constitution of India) makes a strong defiant argument against the bail citing section 45. Shockingly, the ED sessions court regularly rejects the bail on grounds of section 45, possibly due to ED strong influence on the court with malicious ulterior motives, often on political behest. As a result, the Applicant is forced to undergo long period of incarceration in inhuman conditions of Judicial Custody.

Section 24 of the PMLA

Another misused, section of PMLA is section 24, which relates to "*Burden of Proof*". In case of a person charged with the offence of money laundering under section 3, the court shall, unless contrary is proved, presume that such proceeds of crime are involved in money laundering. The burden is on the applicant/accused to prove contrary.

ED, in opposing the bail, invariably and almost always cites the Hon'ble S.C Judgment in cases such as "*Union of India Vs .B.Rama Raju*⁹ and *Union of India Vs. Hasan Ali Khan*¹⁰", wherein the Hon'ble S.C observed that the burden of proof that monies were not proceeds of crime and were not, therefore tainted shifted to the Accused.

However, Section 24 of PMLA has been substituted by the Act of 2013 with effect from 15th Feb 2013 and very clearly states that the presumption can only be invoked against a person who is "Charged" with the offence of money laundering under section 3. Hence, the presumption under Section 24 can only be invoked after the framing of charges in the Trial pertaining to offence under section 3 of the PMLA, and not in the due process of granting bail.

Shockingly, despite section 24 of PMLA not being a subject matter of discussion during bail, it forms one of the main reasons of trial courts rejecting bail.

Inaccurate Diagnosis

It's a mockery of justice that the draconian image of ED results in ensuing that the Applicants are forced to suffer long period of incarceration in Jail by the sheer exploitation of these two sections of PMLA and ironically the lower courts play ball to the illegal imposition by rejecting bail basing their decisions primarily on these 2 sections, despite abundant clarity on these 2 main sections of PMLA.

It may be a revelation to many that this draconian image of ED suffers a body blow when it comes to the abysmally low conviction rates. This conclusively proves that the ED, not being confident of its cases, manipulates its cases and then maliciously opposes bail of the Applicant by unconstitutional misrepresentation of Section 45 and blatantly manipulating section 24 which has no relevance during bail.

Raids are at an All-time high, but Convictions Remain Elusive

The Hon'ble CJI Ramanna pointed recently in the context of Section 124A of the IPC (Sedition Law) that "the conviction rate in such cases is very low"¹¹ and urged the government to scrap this section. Barely 3% of cases booked under section 124A of IPC end in conviction observed by CJI.

However, if you thought 3% is a low conviction rate, you will disbelieve the fact that the conviction rate under PMLA is less than 0.5%. In the last 9 years, ED carried out 1700 raids from March 2011 to Jan 2020 under PMLA in connection with 1569 specific investigations and managed to secure conviction in just 9 cases, most of which are relatively mundane cases.

It's clearly evident that ED hasn't been able to convince courts during the trial proceedings that their allegations are even genuine. Not only is the ED's conviction rate abjectly poor when it comes to PMLA cases, but its efforts at appealing adverse judgments also is equal dismal.

In Financial year 2013, the ED had 13 PMLA cases under appeal - but in the next year (2014)¹², it just dropped to one case with securing any new convictions, which implies that a higher court dismissed at least 12 of those appeals.

Conclusion:

In the past, multiple reports have highlighted how ED does an extremely pathetic job in compiling their case charge sheets and more so in arguing it in the Trial Courts or even H.C. Even though the ED has special PMLA courts to prosecute its cases, the system is extremely creaky and has multiple delays in seeing a full case through. In April 2016, the - then Finance Secretary Hasmukh Adia even chided the ED over its abysmal conviction rate¹³.

Article 21 of the Constitution of India is the Bedrock of our Right to Personal Liberty i.e principle of Natural and equitable justice being a fundamental right of every Indian Citizen. It's time that the judiciary hold their heads high and encourage/ enable fair Judgments instead of letting ED makes a mockery of our Judicial System and be an agency to be misused rampantly by an aggressive Central Government which believes in bulldozing its own executive agencies in exerting unwarranted pressure on the Judicial System.

It's not just the Indian Democracy which is rapidly losing its Global Stature as reflected in Freedom House Report, (Washington based)¹⁴ which downgraded India from "Free" to "Partly Free" because it said political and civil liberties have deteriorated under the current Federal Government. Further, which is a matter of equally great concern that India's two shining Institutions, the EC and SC are under observation. This view is further endorsed by Sweden based V-Dem Institute which has downgraded India to an "Electoral Autocracy"¹⁵ in their Latest Annual Report. To add further to India's rapidly Falling "Brand Image", the

Economist Intelligence unit called India a "Flawed Democracy"¹⁶. The overall picture is damning with alleys focused on Indian Judiciary to get its act together and regain trust which has been heavily compromised for Government favour in the recent past. The new CJI could be India's saviour as reflected in his recent statements.

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